

No. 8942

---

---

In the United States Circuit Court of  
Appeals for the Ninth Circuit

---

ADOLPH BERNARD SPRECKELS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

---

ON PETITION FOR REVIEW OF DECISION OF THE UNITED  
STATES BOARD OF TAX APPEALS

---

BRIEF FOR THE RESPONDENT

---

JAMES W. MORRIS,  
*Assistant Attorney General.*

SEWALL KEY,  
JOHN A. GAGE,  
*Special Assistants to the Attorney General.*

---

---

FILED

OCT 2 1938

WALLA WALLA, WASH.

CLERK



# INDEX

---

	Page
Opinion below .....	1
Jurisdiction .....	1
Question presented .....	2
Statutes involved .....	2
Statement .....	4
Summary of argument .....	8
Argument:	
I. The income, accumulated for the benefit of the petitioner under the provisions of the testamentary trust in 1932 and paid to him in that year is taxable income to the petitioner for the taxable year 1932 .....	9
Conclusion .....	18

## CITATIONS

### Cases:

<i>Blair v. Commissioner</i> , 300 U. S. 5 .....	11
<i>Brown v. Commissioner</i> , 9 B. T. A. 521 .....	14
<i>Codman v. Miles</i> , 28 F. (2d) 823, certiorari denied, 278 U. S. 654 .....	17
<i>Commissioner v. Simmon</i> , 198 N. E. 741 .....	16
<i>Elmhurst Cemetery Co. v. Commissioner</i> , 300 U. S. 37 .....	11
<i>Estate of Budd</i> , 166 Cal. 286 .....	16
<i>Estate of Duffill</i> , 180 Cal. 748 .....	16
<i>Estate of Yates</i> , 170 Cal. 254 .....	16
<i>Freuler v. Helvering</i> , 291 U. S. 35 .....	11
<i>Goldtree v. Thompson</i> , 79 Cal. 613 .....	16
<i>Helvering v. Butterworth</i> , 290 U. S. 365 .....	11
<i>Helvering v. Nat. Grocery Co.</i> , 304 U. S. 282 .....	11
<i>Helvering v. Rankin</i> , 295 U. S. 123 .....	11
<i>Irwin v. Gavit</i> , 268 U. S. 161 .....	17
<i>Letts v. Commissioner</i> , 84 F. (2d) 760 .....	13
<i>McCrary v. Commissioner</i> , 69 F. (2d) 688 .....	13
<i>Riker v. Commissioner</i> , 42 F. (2d) 150 .....	18
<i>Roebbling v. Commissioner</i> , 78 F. (2d) 444 .....	16
<i>Sparrow v. Commissioner</i> , 18 B. T. A. 1 .....	15
<i>United States v. Arnold</i> , 89 F. (2d) 246 .....	13

### Statutes:

Revenue Act of 1924, c. 234, 43 Stat. 253:	
Sec. 219 .....	12
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 161 .....	2
Sec. 162 .....	2

### Miscellaneous:

Treasury Regulations 77:	
Art. 862 .....	3



**In the United States Circuit Court of  
Appeals for the Ninth Circuit**

---

No. 8942

**ADOLPH BERNARD SPRECKELS, PETITIONER**

*v.*

**COMMISSIONER OF INTERNAL REVENUE, RESPONDENT**

---

*ON PETITION FOR REVIEW OF DECISION OF THE UNITED  
STATES BOARD OF TAX APPEALS*

---

**BRIEF FOR THE RESPONDENT**

---

**OPINION BELOW**

The only previous opinion in this case is that of the United States Board of Tax Appeals (R. 18-30), which is reported in 37 B. T. A. 104.

**JURISDICTION**

This appeal involves income taxes for the calendar year 1932 in the amount of \$3,886.11, and is taken from a decision of the United States Board of Tax Appeals entered April 16, 1938 (R. 31). The case is brought to this Court by petition for review filed July 6, 1938 (R. 31-36), pursuant to the provisions of Sections 1001-1003 of the Revenue

Act of 1926, c. 27, 44 Stat. 9, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169.

**QUESTION PRESENTED**

Whether a trust or a beneficiary of a trust is taxable in 1932 on income of the trust for that year paid to the beneficiary in that same year.

**STATUTES INVOLVED**

Revenue Act of 1932, c. 209, 47 Stat. 169:

**SEC. 161. IMPOSITION OF TAX.**

(a) *Application of tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

\* \* \* \* \*

**SEC. 162. NET INCOME.**

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

\* \* \* \* \*

(b) There shall be allowed as an additional deduction in computing the net in-

come of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year; \* \* \*.

Treasury Regulations 77:

ART. 862. *Method of computation of net income and tax.*—\* \* \*

(2) The amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, shall be allowed as an additional deduction in computing the net income of the estate or trust. The amount so allowed as a deduction must be included by the beneficiaries in computing their net income, whether distributed to them or not. If the taxable year of the beneficiary differs from that of the estate or trust, the amount which he is required to include in computing his net income shall be based upon the income

of the estate or trust for its taxable year ending within his taxable year.

#### STATEMENT

The facts may be summarized as follows (R. 18-30, 37-46):

Petitioner is the son of Adolph B. Spreckels, who died testate June 28, 1924.

The last will and testament of Adolph B. Spreckels was admitted to probate in the Superior Court of the State of California, in the City and County of San Francisco, and, after proceedings had been taken in the probate of this last will and testament, a decree of final distribution was entered February 24, 1932. The residue of the estate of the decedent was distributed to six named trustees upon a certain trust set out in the decree of final distribution. It was provided in the trust made part of the decree of distribution that the trustees are empowered to manage, invest, and reinvest the trust property and to collect the income of the said trust estate and to accumulate and dispose of the income of the trust, as follows: (1) One-half of the net income of the trust estate is to be paid to Alma de Bretteville Spreckels during her lifetime; (2) during the lifetime of Alma de Bretteville Spreckels the remaining half of the net income of the trust estate shall belong to and go to Alma Spreckels Rosekrans, Adolph Bernard Spreckels, petitioner, and Dorothy Constance Spreckels, children of the decedent and of Alma de Bretteville Spreckels, share and



share alike; provided, however, that during the minority of any of said children, their respective shares of said net income shall be accumulated and disposed of by the trustees, as follows (R. 21):

As each child attains the age of majority, he or she shall receive from the Trustees his or her proper share of the accumulated net income, and also shall thereafter receive his or her proper share of the current net income, which shares shall be determined by a fraction whose numerator shall be the number one (1) and whose denominator shall express the number of said children then living; including the issue of any deceased child as one person, in representation of his or her parent; and such issue shall take the share his or her parent would have taken if living, by right of representation.

When the last of said children, viz, Alma Spreckels Rosekrans, Adolph Bernard Spreckels, and Dorothy Constance Spreckels, who may survive, shall reach the age of legal majority, one-half ( $\frac{1}{2}$ ) of the corpus or principal of the trust estate shall (subject to the provisions hereinafter made for the payment of the annuity to Alma de Bretteville) be divided and distributed among said children then living, share and share alike, and if said Alma de Bretteville Spreckels be dead at said time, then the whole of the corpus or principal shall be so divided and distributed (subject, however, to the provisions hereinafter made for the

payment of the annuity to Alma de Bretteville).

Should said Alma de Bretteville Spreckels be living when the last of said children, viz, Alma Spreckels Rosekrans, Adolph Bernard Spreckels, and Dorothy Constance Spreckels, who may survive, reaches the age of legal majority, then, upon the death of said Alma de Bretteville Spreckels, the remaining one-half ( $\frac{1}{2}$ ) of the trust estate (that is, the part which shall have been retained by the Trustees to provide income for her) shall (subject to the provisions hereinafter made for the payment of the annuity to Alma de Bretteville) also be so divided and distributed among said children who may be then living.

If, at the time any divisions or distribution of any part of said trust estate, any of said children, viz, Alma Spreckels Rosekrans, Adolph Bernard Spreckels, and Dorothy Constance Spreckels, shall have died leaving issue surviving, then such issue shall take the share which his or her parent would have taken, if living, by right of representation, notwithstanding anything hereinbefore contained.

The Trustees, in their discretion, are authorized and empowered, at any time, to advance to or for the benefit of any of said children such sums of money as they may deem proper, always charging the share which such child shall ultimately receive with the amount so advanced, together with

a reasonable rate of interest, so that all of said children shall ultimately share equally in said estate.

The children of Adolph B. Spreckels, deceased, Alma Spreckels Rosekrans, Adolph Bernard Spreckels, petitioner herein, and Dorothy Constance Spreckels, and Alma de Bretteville Spreckels were all living throughout the entire calendar year 1932. Petitioner's sister, Alma was born August 23, 1909, and Dorothy was born March 9, 1913.

On October 30, 1932, the date upon which petitioner attained majority, there was in the hands of the trustees under the trust net income of the trust in the sum of \$8,042.65, which had accrued from January 1 to October 29, 1932, both dates inclusive, which was payable to petitioner under the trust. All of this income represented dividends received by the trustees during that period, which income was paid to petitioner on October 30, 1932 (R. 45). During the period from October 30 to December 31, 1932, both dates inclusive, petitioner received as his share of the net income of the trust accruing during the latter period the sum of \$2,985.88, all of which represented dividends received by the trustees during the latter period.

Petitioner filed with the Collector at San Francisco an income tax return for the calendar year 1932 and paid the tax shown due thereon in the sum of \$19,137.92. In making the return peti-

tioner did not include in his taxable income the income of the trust accrued from January 1 to October 30, 1932. The Commissioner included the accrued income of the trust in petitioner's taxable income.

#### SUMMARY OF ARGUMENT

Sections 161 (a) (2) and 162 (b) of the Revenue Act of 1932 provide generally that income which is to be distributed currently by the fiduciary of a trust to a beneficiary shall be allowed as a deduction in computing the net income of the estate or trust and that the amount so allowed shall be included in computing the net income of the beneficiary.

The question involved is whether income of a trust, payable to a beneficiary but which is to be accumulated and paid upon his attaining his majority in 1932, is income which is to be distributed currently in that year and thus taxable to the beneficiary. The Supreme Court has held that the test of whether income of a trust is currently distributable to a beneficiary is whether there exists in the beneficiary a present right to receive it. Petitioner not only had a present right under the terms of the trust to receive the income in 1932, when he reached his majority, but he actually received the income in that year. It, therefore, appears that the income received by petitioner is taxable to him in 1932.

## ARGUMENT

## I

**The income, accumulated for the benefit of the petitioner under the provisions of the testamentary trust in 1932 and paid to him in that year is taxable income to the petitioner for the taxable year 1932**

Section 161 (a) (2) of the Revenue Act of 1932, *supra*, provides that the income taxes imposed by the Act upon individuals shall apply to the income of estates of any kind of property held in trust, including "Income which is to be distributed currently by the fiduciary to the beneficiaries \* \* \*." The manner of determining the net income of a trust is set forth in Section 162 of the Act, *supra*, subsection (b) of which provides:

There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, \* \* \* but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. \* \* \*

The portion of the trust instrument set forth in detail in the statement above provides that one-half of the net income of the trust estate is to be paid to Alma de Bretteville Spreckels during her lifetime and that the other half of the net income of the trust estate (during the lifetime of Alma de

Bretteville Spreckels) shall *belong to and go to* Alma Spreckels Rosekrans, Adolph Bernard Spreckels, petitioner herein, and Dorothy Constance Spreckels, children of the decedent and of Alma de Bretteville Spreckels, share and share alike; provided, however, that during the minority of any of the children, their respective shares of the net income of the trust shall be accumulated by the trustees and paid to each child upon reaching the age of majority (R. 21).

The facts show that the net income of the trust in the sum of \$8,042.65, which had accrued from January 1, 1932, to October 29, 1932, both dates inclusive, and which was in the hands of the trustees on October 30, 1932, was payable to the petitioner *under the provisions of the trust* on October 30, 1932, and that such income was paid to him on October 30, 1932. There is, therefore, no question that, under the terms of the trust, the net income in question was payable to the petitioner. The single question in this case is whether such income was to be distributed currently in 1932 and therefore taxable to the petitioner in that year under Section 161 (a) (2) and Section 162 (b) of the Revenue Act of 1932, *supra*.

The Board found as a fact that on October 30, 1932, the date upon which petitioner attained majority, there was in the hands of the trustees under the trust, net income of the trust in the sum of \$8,042.65, which had accrued from January 1

to October 29, 1932, both dates inclusive, which was payable to petitioner under the trust. The Board also found as a fact that this income was paid to petitioner (R. 23). These findings, being supported by substantial evidence (R. 45), will not be disturbed on appeal. *Helvering v. Rankin*, 295 U. S. 123; *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37; *Helvering v. Nat. Grocery Co.*, 304 U. S. 282.

The word *current* is defined in Webster's New International Dictionary as "2. Now passing, as time, or belonging to the present time; as, the *current* month; the *current* number of a periodical." It is obvious that the meaning of "currently" is relative to the unit of time under consideration. Thus if one is considering a weekly periodical, an issue that is three weeks old is distinctly not current, whereas a two months old quarterly is undoubtedly the current issue. Similarly, where one is dealing with a tax statute in which the unit of time is the year, a distribution is current if it is made within that unit of time.

The Supreme Court has held that the test of whether income of a trust is currently distributable and therefore taxable to the beneficiary is whether or not there exists in the beneficiary the present right to receive income. *Blair v. Commissioner*, 300 U. S. 5; *Helvering v. Butterworth*, 290 U. S. 365; *Freuler v. Helvering*, 291 U. S. 35.

*Helvering v. Butterworth*, *supra*, involved Section 219 (b) (2) of the Revenue Act of 1924, which is the same as Section 162 (b) of the Revenue Act of 1932, *supra*. In that case distributions from the income of a trust estate to the widow, who elected to take under her husband's will in lieu of her statutory interest, were held taxable to her. In explaining the evident general purpose of the statute, the Court stated (p. 369):

If nothing was payable to beneficiaries, the income, without deduction, was assessable to the fiduciary. But he was entitled to credit for any sum *paid to a beneficiary within the intendment of that word*, and this amount became taxable to the beneficiary. \* \* \*  
[Italics supplied.]

In the instant case the income received by the trust within the tax year had been *paid* to the petitioner. The trust was entitled to a deduction from its income for such amount in computing the trust income for tax purposes. The beneficiary was therefore required to include the amount of the income paid in his net income under the provisions of the statute.

In *Freuler v. Helvering*, *supra*, the trustee deducted from gross income an amount representing depreciation but failed to withhold from the beneficiaries, to whom he paid income, the amount of the depreciation deduction. The Commissioner increased the income shown on petitioner's return by so much of the amount received as reflected the



proportionate share of the depreciation, and determined a deficiency accordingly. In stating the test for determining whether the sum actually paid was in fact distributable income under a statute similar to that in the instant case, the Court said, at page 42:

For the purpose of imposing the tax, the Act regards ownership, the right of property in the beneficiary, as equivalent to physical possession. The test of taxability to the beneficiary is not receipt of income but the present right to receive it.

In the instant case, there can be no question that the petitioner had a present right under the terms of the trust to receive income from the trust in the amount of \$8,042.65 in the current year in which he reached his legal majority. It is submitted that such income is taxable to the petitioner under the decisions of the Supreme Court, *supra*.

The rule that the present right to receive income is determinative of when the income shall be considered as "currently distributable to the beneficiaries" was followed by this Court in *Letts v. Commissioner*, 84 F. (2d) 760 (C. C. A. 9th), and in *McCrorry v. Commissioner*, 69 F. (2d) 688 (C. C. A. 5th); *United States v. Arnold*, 89 F. (2d) 246 (C. C. A. 3d).

The facts disclose that on October 30, 1932, there was in the hands of the trustees net income in the sum of \$8,042.65, which was payable to the peti-

tioner under the trust, and that this amount was paid to the petitioner on October 30, 1932. Here it may be said, as was said in *McCrorry v. Commissioner, supra* (p. 690):

Whether income "is to be distributed currently" \* \* \* depends on the terms of the trust instrument. \* \* \* Similar provisions of the Revenue Act of 1921 were construed in *Freuler v. Helvering, Commissioner*, 54 S. Ct. 308, 78 L. Ed. —, \* \* \*. The test here is not what this trustee thought or did, but what his trust empowered or required him to do. \* \* \*

Similarly, in *United States v. Arnold, supra*, where income was realized in 1928, but retained by the trustees until a determination of the Orphans Court in 1932 that such income was distributable to the beneficiaries, the Circuit Court held that the income was "currently distributable" in 1928, when received by the fiduciaries.

The Commissioner's position in this case has been approved by the Board of Tax Appeals in several other cases. Thus, in *Brown v. Commissioner*, 9 B. T. A. 521, a testamentary trust created in 1899, terminated on November 18, 1920. The income was to be accumulated over the life of the trust and paid over to the beneficiaries at the termination thereof. The Board, nevertheless, held that so much of the income as was allocable to the period from January 1, 1920, to November 18, 1920, was not taxable to the trustees but rather should have

been included in the income of the beneficiaries (p. 525):

We regard it as immaterial that the income of the trust fund was to be accumulated for a period of years, which period came to an end during the taxable year. The income received by the trustee in 1920 was not held for future distribution under the terms of the will or trust for the entire year. It was paid over to the beneficiaries during the year. \* \* \*

To the same effect is *Sparrow v. Commissioner*, 18 B. T. A. 1.<sup>1</sup>

In the instance case, the petitioner not only had a present right to receive the income of the trust, but he had received such income. There was a complete absence of power in the trustees to do anything with the share of the income accumulated for the beneficiary but to pay it to him upon his attaining his majority. We submit that under these circumstances the income in question was to be distributed currently to the petitioner under the terms of the trust instrument on October 30, 1932, and that such income, having been distributed cur-

---

<sup>1</sup> It is true that both the *Brown* and *Sparrow* cases arose under the 1918 Act. But while the provision in that Act is not precisely the same as the corresponding one in the 1932 Act, the two are very similar. Moreover, whatever changes there were in this regard between the two statutes first appeared in the Revenue Act of 1924, but the Committee Reports in connection with the 1924 Act fail to show that Congress attached any significance to those changes.

rently in 1932, is taxable to him in that year under Section 161 (a) (2) and Section 162 (b) of the Revenue Act of 1932, *supra*.

There is no merit to petitioner's contention that the income when received by him was part of the corpus of the bequest. The Supreme Court of California has repeatedly held that where property is held in trust, the income to be accumulated and paid to the beneficiary when he attains majority, the beneficiary is entitled to receive income. *Estate of Yates*, 170 Cal. 254, 258; *Estate of Budd*, 166 Cal. 286, 293; *Estate of Duffill*, 180 Cal. 748, 761; *Goldtree v. Thompson*, 79 Cal. 613, 624.

Petitioner cites *Roebing v. Commissioner*, 78 F. (2d) 444 (C. C. A. 3d), and *Commissioner v. Simon* (Mass., 1935), 198 N. E. 741, in support of his contention, but the facts in these cases are not sufficiently similar to the instant case to warrant giving petitioner's contention consideration herein. In *Roebing v. Commissioner, supra*, property was conveyed by will to trustees, who were to collect and receive the rents, income, dividends, and profits and after paying out expenses, so much of the income as was deemed advisable in the discretion of the trustees for the education, support, and maintenance of the beneficiary was to be paid to him until he should reach the age of twenty-one years, when his share of the corpus, *with any accumulated income thereon*, was to be paid to him. Similarly, in *Commissioner v. Simon, supra*,

funds were bequeathed to trustees to be invested until the beneficiary became twenty-one years of age, then to be paid to him *with all the accumulations*.

The trust in the instant case provides that any distribution of *principal* to the beneficiary, who is the petitioner herein, shall be made only on or after March 9, 1934, when the petitioner's younger sister attains her legal majority (R. 21-23). The trust does not provide that any of the *net income* of the trust shall be added to the *principal*.

The trust directs the accumulation of the trust income and the distribution of such income to the beneficiary at a given time. Since there is no direction in the trust to pay the principal *with the accumulations* to the beneficiary upon his obtaining majority, but only that the accumulated *income* shall be paid to him at that time, petitioner's contention that the income when received by him was part of the corpus of the bequest is not supported by the cases cited by him.

The trust instrument herein directs the manner of distributing *income* of the trust. The amount of \$8,042.65 was in fact distributed to petitioner in 1932, pursuant to the terms of the trust which was made a part of the decree of distribution of the Superior Court of California. This amount was income to the petitioner. *Irwin v. Gavit*, 268 U. S. 161; *Codman v. Miles*, 28 F. (2d) 823 (C. C.

A. 4th), certiorari denied, 278 U. S. 654; *Riker v. Commissioner*, 42 F. (2d) 150 (C. C. A. 2d).

CONCLUSION

It follows that the decision of the Board of Tax Appeals is correct, is in accordance with law, and should be affirmed.

Respectfully,

JAMES W. MORRIS,  
*Assistant Attorney General.*

SEWALL KEY,

JOHN A. GAGE,

*Special Assistants to the Attorney General.*

OCTOBER 1938.